

Dissenting Statement of Committee Members Gary Wilson and Gil Lima

We respectfully dissent to the Committee's recommendation to eliminate the provision of Mass.R.Crim.P. 7 (a) (2), which has permitted, since the inception of the Rules of Criminal Procedure, summonsed defendants who have retained counsel to be excused from appearing at arraignment.

The Committee agrees that this provision is utilized in a very small number of cases.

The majority of this Committee believes that the advantage of having a summonsed defendant who has retained counsel being excused from appearing for arraignment is outweighed by the need to accomplish a number of important tasks that the court must undertake when defendants first appear before them. We have listed below these tasks and our reply to each one.

1. The need to establish the defendant's identity and criminal history, including any out of state record through a probation interview.

Dissenters' Response: Not all defendants have a criminal history of court appearances. An individual may present himself/herself to probation officials prior to the arraignment date and provide proof of identification, or counsel may provide identification information to the probation office. An individual who has retained counsel need not complete the intake form probation requires to qualify for appointment of counsel for they are not seeking to qualify for court appointed counsel.

2. Someone with an outstanding warrant may remain at large.

Dissenters' Response: A person with an outstanding warrant would not usually be summonsed for a court arraignment. Police officials in the course of their investigations into the criminal activity which is the subject of the complaint or indictment, would have checked for outstanding warrants from various databases available to them and requested the Clerk Magistrate issue an arrest warrant in the District Court, or the District Attorney would have requested the Superior Court Justice to issue an Indictment Warrant.

3. Courts are deprived of an opportunity to set appropriate conditions of release on individuals who are a flight risk.

Dissenters' Response: If a person is a "flight risk" they should not be summonsed for a court appearance; a warrant would be issued for their arrest and subsequent court appearance. The court may further schedule a court hearing for conditions of release if a defendant utilized the existing provisions of Rule 7(a) 2, and the court finds that conditions of release are required.

4. The need to commence a probation violation proceeding in a timely fashion as a result of a new case.

Dissenters' Response: Once again, not all defendants are on probation. Under existing law (G.L. chap. 279 sec 3), a probation officer would send notice to a probationer to appear for a court hearing re: Violation of the Terms and Conditions of Probation, or ask the court to issue a warrant for violation of probation where permitted by law.

5. The need to accommodate the right of a victim to request a "no contact order."

Dissenters' Response: Not all criminal cases involve a "victim" who would be seeking a "no contact order." If a defendant is charged with a complaint or indictment involving a crime against the person, or a charge of domestic violence, the prosecutor may ask the court to require the defendant to appear for the imposition of a "no contact order" on a subsequent court date.

6. The need to give defendants the G.L. c. 276 sec. 58 bail revocation warning.

Dissenters' Response: Privately retained counsel could be required to provide the court with a writing executed by his/her client acknowledging the provisions of G.L. chap. 58 "bail revocation warning" and file same with the court to satisfy notice of the bail revocation provisions of G.L. chap. 276 sec 58.

7. Drug exam notice (if applicable) pursuant to G.L. chap 111E sec 10.

Dissenters' Response: Not all complaints or indictments involve controlled substances requiring a G.L. chap 111 E sec. 10 notice and retained counsel could so advise his/her client of said rights on drug cases.

In conclusion, the majority of this Committee has not made a compelling case to eliminate a long-standing provision of the Rules of Criminal Procedure.

The purpose and construction of the Criminal Rules of Procedure as set forth in Mass.R.Crim.P 2 (a) are . . . to provide for the just determination of every criminal proceeding . . . They (Criminal Rules) shall be constructed to secure simplicity in procedure, fairness in administration, and elimination of expense and delay.

The proposed elimination of Mass.R.Crim.P 7 (a) (2) does not advance the purpose and construction of the Criminal Rules as set forth in Mass.R.Crim.P 2 (a) in that it eliminates, without substantial justification, the existing procedure whereby a defendant who has retained counsel is excused from appearing before the court for the purpose of arraignment. Mass.R.Crim.P 7 (a) (2) should not be eliminated.